UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555 (JMP)

Adv. Case No. 09-01062

- x

In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., ET AL.,

Debtors.

- x

TURNBERRY CENTRA SUB, LLC, et al.,

Plaintiffs,

v.

LEHMAN BROTHERS HOLDINGS, INC., et al,

Defendants.

- x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

June 13, 2013

10:04 AM

B E F O R E :

HON JAMES M. PECK

U.S. BANKRUPTCY JUDGE

Hearing re: Objection to Claim No. 62723 of Banesco Holdings CA [ECF No. 37327]

Hearing re: Four Hundred Second Omnibus Objection to Claims 32395 and 22671 (No Liability Derivatives Claims) [ECF No. 36006]

Hearing re: Turnberry Centra Sub, LLC, et al. v. Lehman Brothers Holdings Inc., et al. [Adversary Case No. 09-01062]. Motion to Dismiss.

Hearing re: Motion by Lehman Brothers Holdings Inc. and Lehman Commercial Paper Inc. For an Order (i) Determining that the LCPI Settlement was entered into in Good Faith Pursuant to California Code of Civil Procedure paragraphs 877 and 877.6, and, Based on Such Good Faith Finding and for Other Reasons, (ii) Disallowing and Expunging Proofs of Claim Number 28845 and 28846 [ECF No. 36163]

Hearing re: Debtors' Ninety-Seventh Omnibus Objection to Claims (Insufficient Documentation) [ECF No. 14492]

Hearing re: Debtors' One Hundred Twenty-Fifth Omnibus Objection to Claims (Insufficient Documentation) [ECF No. 16079]

Hearing re: Debtors' One Hundred Thirty-Eighth Omnibus Objection to Claims (No Liability Derivatives Claims) [ECF No. 16865]

Hearing re: Debtors' One Hundred Ninety-First Omnibus Objection to Claims (Valued Derivative Claims) [ECF No. 19888]

Hearing re: Three Hundred Twenty-Eighth Omnibus Objection to Claims (No Liability Claims) [ECF No. 29323]

Hearing re: Three Hundred Sixtieth Omnibus Objection to Claims (Valued Derivative Claims) [ECF No. 31316]

Hearing re: Three Hundred Ninetieth Omnibus Objection to Claims (Valued Derivative Claims) [ECF No. 34044]

Hearing re: Three Hundred Ninety-Fourth Omnibus Objection to Claims (Valued Derivative Claims) [ECF No. 34728]

Hearing re: Three Hundred Ninety-Eighth Omnibus Objection to Claims (No Liability Derivatives Claims) [ECF No. 34732]

Hearing re: Four Hundred Twelfth Omnibus Objection to

Claims (Duplicative Claims) [ECF No. 37166]

Hearing re: Debtors' Objection to Proof of Claim No. 66099 Filed by Syncora Guarantee, Inc. [ECF No. 20087]

Hearing re: Plan Administrator's Omnibus Objection to Claims Filed by Deborah E. Focht [ECF No. 34303]

Hearing re: Objection to CMBS Claims and Request for Subordination Pursuant to Sections 510(a)-(c) of the Bankruptcy Code [ECF No. 36882]

Hearing re: Merits Hearing With Respect to Proofs of Claim Number 57069 and 45833

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P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Be seated, please. Good morning.

MS. MARCUS: Good morning, Your Honor. Jacqueline Marcus, Weil, Gotshal & Manges, on behalf of Lehman Brothers Holdings, Inc. and its affiliates.

The first matter on the agenda this morning, Your Honor, is an uncontested matter. It pertains to the objection to claim number 62723 of Banesco Holdings.

Lehman filed an objection to the claim of Banesco and, since that time, has been engaged in discussions with Banesco, and we've agreed to partially resolve the objection. So we have a form of revised order that Banesco has approved, and it basically provides for the expungement of one of the claims filed by Banesco and adjournment of the hearing with respect to the other claim.

If I may, Your Honor, I have a blackline copy of the order?

THE COURT: You can hand that up.

Thanks.

MS. MARCUS: And Ms. Dye is here on behalf of Banesco, and I think she's going to confirm that we've reached an agreement on the form of the order.

THE COURT: You're so far away that, even if you say you're in agreement, it won't be picked up by our

recording equipment.

MS. DYE: So I can come up to the podium?

THE COURT: I think you're going to have to come up and speak into a microphone, and please also identify yourself for the record.

MS. DYE: My name's Bonnie Dye. I'm from Chadbourne & Parke, and we represent Banesco Holdings, and we agree with the proposed order as handed up to you this morning, Your Honor.

THE COURT: Thank you.

If I could just ask what's going to happen with regard to the portion of this objection that's being deferred to August 15th?

MS. MARCUS: My understanding is that the parties are continuing to discuss resolution of the claim.

UNIDENTIFIED SPEAKER: That's correct.

MS. MARCUS: So hopefully, there will be no need to have a hearing, but I just can't assure the Court about that.

THE COURT: Understood, and, just for clarity -- I'm looking at the words in the blackline -- the response deadline is August 15, and the matter is adjourned 'til August 29.

MS. MARCUS: That's correct.

THE COURT: Okay. That's fine.

MS. MARCUS: Thank you, Your Honor.

Switching to the contested portion of the calendar, Your Honor, the next matter, number two, will be handled by Jay Tambe of Jones Day.

MR. TAMBE: Good morning, Your Honor. Jay Tambe and Locke McMurray, from Jones Day, for debtor Lehman Brothers Holdings, Inc.

This is LBHI's objection to claims number 32395 and 22671. To the extent that any of the discussion rolls over to a discussion of the LBHI, LBF Lehman Switzerland settlement, I would defer to Mr. Perez from the Weil firm, because I know he's intimately familiar, as is Your Honor, with that settlement.

This hearing, Your Honor, is a legal sufficiency hearing. It is the basis of our objection that there is no legal basis for the claim that has been submitted in these two claims, 32395 and 22671.

Fundamentally, what you have here are a series of derivatives contracts that were governed by the master agreements. Those contracts each contain automatic early termination provisions so that, as soon as LBHI filed the bankruptcy, each of those derivatives transactions was terminated on September 15th, 2008. There's no dispute as to any of those issues. What you have in these claims are valuations that have been submitted not as of the early

termination date, but as of a much later date, October 16th, 2008.

THE COURT: What would be the difference in valuation if the valuation had been done as of September 15, 2008 as opposed to the October date?

MR. TAMBE: The claimants have not submitted any valuation as of that date. The debtors position is, as of that date, based on the value of SAP stock, which is the underlying, they, in fact, would have been a receivable to LBF, and therefore, no claim with respect to Lehman Brothers Holdings, Inc.

THE COURT: Okay.

MR. TAMBE: If I could briefly go into the argument, Your Honor?

THE COURT: Sure.

MR. TAMBE: We have a small hearing binder with just a couple of exhibits that I might want to draw your attention to. If I could hand those up, please?

THE COURT: You may.

(Pause)

MR. TAMBE: Your Honor, the following issues are uncontested. As I said, the early termination date is not contested. The fact that it was an automatic early termination is uncontested. It's uncontested that the agreement required, in the first instance, for the

calculation of the termination amount to be done as of the early termination date, and it's uncontested that, under section 562, September 15th, 2008 is the date on which the contract should be valued, absent certain circumstances, and the issue really is is there a basis to value these contracts on a date other than September 15th, 2008. Namely, is there a basis to value as of October 16th?

If I could draw your attention, Your Honor, to Tab 7 in the binder I just handed up. Now, what Tab 7 is is a stock price chart of SAP stock, and I've highlighted on that stock price chart certain key events. You have September 15th, 2008, the early termination date. You have October 16th, 2008, which is the date as of which these contracts were valued, and you've got December 1, 2008, which is the date on which the valuation was actually done.

So you have a situation here where there is a look-back valuation being done, and there's nothing wrong with that. We don't take issue with that.

However, the look-back doesn't look back to September 15th, 2008. The look-back only looks back to October 16th. Looking at the stock price chart, I could speculate as to why that date was picked. As you could tell, there's a sharp dropoff in the SAP stock price from mid-September to mid-October, and, while it's a complicated set of derivatives transactions, quite simply, as the stock

price of SAP went down, Lehman was out of the money. All right? The stock price of SAP was high. Lehman was in the money.

Now, the rationale that's given for why when the calculation was done in December -- it was done as of 10/16 as opposed to 9/15 is that well, it was only on 10/16/2008 that the claimants were told that they would not be getting back certain collateral that had been posted with Lehman. The calculation that was done on December 1, 2008 was done on the basis of there being no return of collateral.

On December 1, they could just as easily have done exactly the same type of calculation on the basis of no return of collateral, but used the SAP stock price from September 15th, 2008 as opposed to October 16th, 2008. No reason why they couldn't have used that stock price. There's no reason why they have to do it as of October 16th, 2008, and the fact of the matter is it's not like they entered into a replacement transaction on any particular date. This was a look-back valuation exercise.

The contract told them to do it as of 9/15. 562 of the bankruptcy code told them to do it as of 9/15. They chose to do it as of 10/16.

THE COURT: Well, doesn't that get us into the question of whether or not there is a justification to pick a different date on account of the uncertainties surrounding

the return of the collateral held by LBIE?

MR. TAMBE: We would expect no, Your Honor, because what they knew on December 1 when they did the valuation is they would not be getting the collateral back. That uncertainty that existed had been resolved by then. Now, the simple question is now that that uncertainty has been resolved, when do you apply that set of facts now to the relevant values.

THE COURT: I understand.

MR. TAMBE: Now, --

THE COURT: But it's their position.

MR. TAMBE: It's their position.

THE COURT: It's their position that there is some justification for picking the 10/16 date, and --

MR. TAMBE: And --

THE COURT: -- you take the position that there is no justification for any date other than September 15?

MR. TAMBE: Absolutely. I mean, if their rationale is the reason it's 10/16 is because that's when they learned they wouldn't be getting collateral back -- and that's the only justification they've offered -- that's not a reason for them not to calculate this as of 9/15. Because the test, again, is could they have calculated value, and this was, in all instances, a look-back calculation. Sure, they could have calculated the value, because the

calculation was done, not on 9/15, not on 10/16. It was done in December.

There's a further point that we've made in the papers, and you don't have to reach it, but, if you need to reach it, you could, and that has to do with whether it's appropriate in any event to consider the posting of collateral or whether collateral's available to be posted as a matter of English law when you're doing this valuation, and we've said that there's clear precedent from the Court of Appeals in it (sic) that says under the 1992 master agreement, when you do a valuation calculation, you do it on the basis that all conditions precedent have been satisfied. You assume that the collateral has been posted. You assume that all those conditions are satisfied. You do it on a value-clean basis.

So, even if you looked at the analysis from that perspective and got to that level -- I don't think you need to -- as a matter of English law, you'd have to calculate it on 9/15, and this issue that they raised about the availability of collateral would, in fact, be irrelevant.

THE COURT: You're mentioning this law, and let me just throw out a law school question that you probably have the answer to. There is a proceeding in Switzerland. I don't know all of the proceedings that are going on there, but I've read about them, and I'm sure I'll hear about them

from counsel for the claimant.

Do you know whether or not that proceeding in Switzerland is applying principles of English law that govern the transaction documents or applying Swiss law with reference to the insolvency proceeding of LBF? That's question one, and question two is do you know if it is permissible in the Swiss proceeding for the Swiss court to consider the application of section 562 under our law, because, as I'm understanding this, we have the law of at least three jurisdictions that are implicated here.

We have a Swiss proceeding, which deals with the main claim. We have the U.S. bankruptcy proceeding, which deals with the guarantee claim, and we have a choice of governing substantive law, being the law of England and Wales. Do I have that right?

MR. TAMBE: That's right, Your Honor. Let me maybe start with the second question first.

It is my understanding that the Swiss tribunal, the Swiss court that's hearing the various Swiss proceedings, will not, in fact, apply 562. The 562 argument is one that's raised by LBHI as a U.S. debtor --

THE COURT: Yes.

MR. TAMBE: -- in this forum. The claim against LBHI as guarantor is not present in the Swiss proceedings at all.

THE COURT: Okay. So, if we get to the essence of today's argument, which we actually haven't reached yet, it is the request by the claimant that this proceeding be stayed or deferred for six months in order to defer to the Swiss tribunal, which you oppose, and one of the reasons that you oppose it, I take it, is that we're able here to apply section 562 principles and, based upon the movement of the stock, make what amounts to a summary judgment determination that this claimant has no claim.

MR. TAMBE: That's right, Your Honor, and you can make that determination as a threshold matter simply on the basis that they have valued their claim as of the wrong date. The claim that has been submitted is valued incorrectly, because it was valued as of the wrong date.

THE COURT: Well, it's valued as of a date that, under 562 language, you could argue is a permissible date for valuation and that they would argue is not a permissible date for valuation because of the collateral issue, which you say is irrelevant.

MR. TAMBE: That's right. We would say, under 562, the permissible, the only permissible valuation date is September 15th, 2008, unless they carry the burden of demonstrating that there were no commercially-reasonable determinates (sic) of value of that date, which they have not done.

THE COURT: Okay. Let's continue with the argument.

MR. TAMBE: If I could turn to the stay argument, we start with the premise that they claim that judicial efficiency and avoidance of duplication should militate (sic) this Court (sic) in staying its hand. What we have before the Court is a fully developed legal argument on 562 and the correct date for valuing the termination values. It's our position no further submissions are needed on this.

Contrast that with what's going on in Switzerland, where the proceedings have just gotten underway. Tab 1 of the binder I handed up, Your Honor, has some of the relevant dates in it. The first four dates deal with the termination, but starting with March 15th, 2033, that's when we filed the omnibus objection objecting to these claims in their entirety. March 25th, the claimants began the first of multiple proceedings in Switzerland, and this was a declaratory action against Lehman Switzerland in Zurich District Court, so not only the bankruptcy proceeding, but an ancillary or collateral proceeding in the Swiss courts against LBF, not against LBHI.

Meanwhile, in this Court, we filed a more detailed omnibus objection. It was about a week after that that the claimants first challenged Lehman Switzerland's zero valuation of their claim in the LBF Swiss insolvency

proceeding and then, more recently, less than a month ago, they started yet another proceeding, and what they have done there is object to the LBHI, LBF settlement.

So, to the extent they are complaining about duplicative proceedings, they have started the duplicative proceedings. I mean, they are multiplying the proceedings in Switzerland and saying aha, now we've got multiple proceedings. You've got to stay your hand here, Judge, even though this is the only forum in which claims against LBHI and LBHI's ability to invoke the protections of the bankruptcy court are relevant. Those issues aren't being addressed anywhere else.

The standard against which any stay should be measured -- and this comes from the Supreme Court decision in Colorado River Water Conservation District. The Court has an unflagging obligation to exercise the jurisdiction given to it and should stay a proceeding only under exceptional circumstances, and we would submit, Your Honor, they have not made out a case for exceptional circumstances.

THE COURT: I agree.

MR. TAMBE: Then I think I'll stop then with that part of my argument here. Happy to answer any questions the Court might have, and I'll respond to whatever Mr. Zimmerman has to say.

THE COURT: I'll hear what Mr. Zimmerman has to

say, but what he has to do is change my mind.

MR. ZIMMERMAN: Good morning, Your Honor. George Zimmerman, representing KTS and Dr. Tschira, the claimants, with my colleagues, Max Polonsky and Julie Cohen.

Let me change the entire order or my argument and address and answer, from our perspective, the questions you raised, because I think, frankly, you raised all the right questions. First, in the Swiss proceedings -- strike. The ISDA agreement, the underlying ISDA agreement is governed by English law. Nobody disputes that. In the Swiss proceedings, the substantive rights of the parties under the ISDA agreement will be determined by English law. In the Swiss proceedings, the claimants have submitted a very detailed evidentiary submission, about a hundred pages of law and facts, evidentiary facts to take into account all the factors that English law would look at to determine whether there was a reasonable determinant of value on September 15th, as Lehman says, or October 16th.

In those papers, the claimants also indicated -- because LBF obviously is going to get a chance to respond -- that they will be submitting an expert affidavit on English law, precisely because the English law will be applied. There is two issues about this return of collateral issue. The reason -- and Lehman says that's irrelevant under section 562. Here's why it's relevant both under English

law, which governs the ISDA and under section 562.

The English law affidavit will say, in sum and substance, that, under English law, the reason there is flexibility, albeit limited, to value either as of the early termination date, or, if it's not reasonably practicable, the earliest date thereafter as is -- the reason for that flexibility is, under English law, to give the non-defaulting party the opportunity to get, to try literally to negotiate and get into and enter into an exact appropriate replacement transaction, and, in fact, the claimants here did -- whenever there's an early termination, a non-defaulting party -- and you know this because you've been involved with this -- can decide right away I don't want to enter into a replacement transaction, and they can get a quote, and you can argue about the quotes.

Other times, claimants do try to enter into replacement transaction. That's what happened here. Claimants led to three market makers with expertise. This is a very exotic, complicated slope (sic). It's very large. There was very little market for it, and so, they went to what they thought were the three primary experts in this that could enter into transaction, and, because -- and this is undisputed -- because there were discussions between the claimants and Lehman entities -- and we can debate which Lehman entities -- that led us to believe that the

collateral would be released quickly, --

THE COURT: That was LBIE, wasn't it?

MR. ZIMMERMAN: No. Okay, let me -- two answers to that. First, the submission in Switzerland says that also included LBF, and they have the names of the LBF people who are on the list, but, more to the point, the master custody agreement that governs the placement of the shares was a tripartite agreement, the claimants, LBIE, and LBF -- LBIE was just the custodian.

The 59 million shares of collateral were specifically for the benefit of LBF, which is defined as the chargee, and, under the terms of the March agreement -- and I'll get you this in a minute. We can hand it up. LBF determines when to release the collateral. LBIE has to get instructions from LBF.

So the notion that they have -- and this is one of the dangers of asking for a ruling with no evidentiary record where the evidentiary record is being developed in another proceeding. So, as a practical matter, it's LBF to whom LBHI is the guarantor who made the determination who first said, you know, we'll release it in short time and then, on October 16th, said you're not going to get it, and the reason that's important is because the English affidavit will also say that the valuation date, because the flexibility I talked about was designed to enable the party

to literally try to enter into replacement, an exact replacement transaction, which here would be a collateralized transaction -- as, under English law, it's only at the time you learn that you cannot enter that duplicate transaction. That is the date that's the valuation date. That's why October 16th was picked, because that -- it's undisputed that's when the claimants learned from LBF and LBIE that the collateral wouldn't be forthcoming, and that's why October 16th was selected.

So, with respect, when Lehman gets up here and says I can speculate based on share prices why October 16th was picked, that's not what the record reflects in Switzerland. The record reflects that that's English law. That's when we found out the collateral was not going to be released.

THE COURT: But let me ask you a very fundamental threshold question. At least for me, it's a threshold question.

MR. ZIMMERMAN: Yes.

THE COURT: Not withstanding the fact that we are dealing with documents that are governed by English law, there is a law of the case in this bankruptcy estate that I apply safe harbor principles, regardless of the underlying law that governs the ISDA contract, and am I not, under section 562, making judgments that do not speak to the

question of governing law as to the underlying safe harbor qualified financial contract, but rather dealing with principles of U.S. law that govern such questions? The law governing commercially-reasonable determinants of value does not speak to as provided by certain English law governed documents. It rather is an open-ended question, and I believe I have the discretion -- respond to this please -- to completely ignore applicable English law, to completely ignore what an expert on English law would say, and to completely ignore properly, under principles of comity, what a Swiss court might say because the Swiss court is applying different standards. What do you say to that?

MR. ZIMMERMAN: I say the following. Section 562 actually -- and we agree with -- 562 is not going to be an issue in Switzerland, and, even if it was, you're going to decide 562, not a Swiss proceeding. We get that.

562 has two concepts, and it has a legislative history. The legislative history, which is 2005 W. law, 832198, specifically talks about the section 910, which is the section that was added to talk about the valuation date, and what it says, as you well-know, is it's the date of early termination, except if there are no commercially-reasonable determinants of value as of such date. Damages are to be measured as of the earliest subsequent date or dates in which there are commercially-reasonable

determinants, which you just cited.

The legislative history goes on to say -- it talks about the factors that one would consider in determining commercial reasonableness, because that, by definition, is a mixed question of law and fact, and then, it says, quote, "The references to commercially-reasonable are intended to reflect existing state law standards relating to a creditor's actions in determining damages," close quote.

We say -- and I don't think it's in dispute -- that the relevant state law standards that govern the creditor's rights under the ISDA agreement here is England. So, even if -- not even if. If the day comes -- because let's play it out. Let's be candid. Let me be candid.

If the claimants lose in Switzerland, you're never going to see us again, obviously. There's no guarantee issue, but, assuming for the moment that they're prevailing, when we come back to you and there are no guarantee defenses, because they basically -- it's an unconditional guarantee, and Lehman waived all defenses, other than, I believe, statute of limitations and payment. So forget that.

Your issue, Judge, will be the 562 issue. Now, you can do one of two things. You can conclude that I'm reading the legislative history wrong, or that you disagree that 562 was intended on this particular point -- they're

specifically talking about commercially-reasonable valuation dates -- was intended to incorporate or look to the applicable state law. Even if you -- either you'll agree with --

THE COURT: Even if I do what the Supreme Court and the Second Circuit does all the time, which is effectively disregard legislative history, --

MR. ZIMMERMAN: Fair enough. If you disregard the legislative history, Justice Scalia, two issues. I think even Justice Scalia only disregards if it, on its face, contradicts or renders meaningless the plain words of the statute, and I don't think the statute, as you correctly pointed out, speaks to that issue. So I don't think it would be appropriate to -- but, even if you do, then what you are being asked to do is today, based on 25 pages of briefing, conclude as a matter of law with no facts, no testing of factual assertions by either party in their pleadings because these are lawyers --

THE COURT: By the way, I'm not going to do that. I'm not deciding that today. So, in the same way that I summarily agreed --

MR. ZIMMERMAN: Okay.

THE COURT: -- with Mr. Tambe, I'm agreeing with you. It's not happening today.

MR. ZIMMERMAN: Let me close --

THE COURT: So does that make it easier for you?

MR. ZIMMERMAN: Well, it certainly makes some of it easier, yes.

THE COURT: Right.

MR. ZIMMERMAN: But let me then go to my final point, at least for the moment. I never say final point. I'll think of something else, but let me go to the next point.

What made a path, if I can suggest it, might actually satisfy some of Lehman's issues. As I said, the status of the Swiss proceedings is the claimants put in the substantive evidentiary brief. They will, at the appropriate time, put in an expert affidavit on a number of things, including English law.

I think Lehman pointed out in their papers correctly that there is some dispute in Switzerland about the amount of bond that has to be posted. We are not counsel in the Swiss proceedings, but I've been advised of what I'm about to tell you by the client.

The bond issue has been fully briefed. I think it was fully briefed as of last week or the week before. So the judge is going to make that decision.

Once that decision is made, LBF Lehman Switzerland has 90 days to file their papers, and thereafter, claimants have 60 days to file their reply. So that's a little more

than six months, but that's what it is, and, at that point in time, it's fully briefed, the judge then decides what he or she wants to do, whether he's going to rule on the papers, whether he wants more briefing, whether he wants discovery, whatever, or whether he wants the parties to consider settling. That's kind of the timeframe, and that's the best I can give you. I can't predict anything beyond, and you're correct.

We're not asking for perpetual estate, because I'm not in a position to represent to you when a definitive resolution is going to be. So I get that, but the factors on determining stays, which obviously is discretionary when it comes to international issues -- we cited the Royal Sun Alliance case, which -- and the language they cited has to do with the issue of whether we were asking you to dismiss because of the Swiss proceedings, and that's when the unflagging obligation of courts to exercise jurisdiction comes in. We're not asking for that.

We're asking for a six-months date. If you look at the back of the Sun Alliance case, they cite -- they specifically remand to the district court to consider -- you may consider it, district court, whether it's appropriate to stay. They cite four circuit court of opinions, Eleven, Second, and two Seventh Circuit opinions that stayed in favor of pending foreign proceedings, temporarily, including

an Eleventh Circuit case that actually stayed -- its Turner Entertainment against Degeto -- that stayed pending, I think, Bermuda actions, notwithstanding the Court mentioned that the Bermuda actions had barely had any progress whatsoever.

So what I would respectfully suggest is this. I agree with Lehman that, at some point, if the claimants are successful in Switzerland, we will get to the 562 issue. Since that is inevitable, what you might think about is whether the issue of 562, whether it should consider English law or ignore, whether on these, what I would call a naked record, 562, as a matter of law allows you to make a determination as to whether this was, quote, "commercially-reasonable" or not.

If you think briefing on those legal issues would advance the ball since, if we end up before you, you could get that head-start, that's something where I think you could be comfortable that, while there may be a six-month stay, it's not like nothing's going to be going on here, and you can actually -- and the parties and the Court can actually, depending on how the process goes and what the decision ultimately is, may foster progress, but I don't think -- and I took comfort by the fact that you're not going to decide that today. I do think a six-month stay and then coming back to you and telling you where the parties

are in six months -- and then, you could do whatever you think is appropriate. It makes some sense.

THE COURT: Well, I agreed with Mr. Tambe earlier when the issue was was I going to stay this, and I agreed with him that I was not going to. You're effectively proposing something that amounts to a modified stay, but let me tell you how I view this, and I'd like to get your reactions.

I view what's going on in Switzerland as not directly relevant to the claim resolution process in this Court, although you've pointed out that, if you are unsuccessful in the case against LBF in Switzerland, claims here go away. If you are successful, the 562 issue can effectively be revisited then with reference to the guarantee claim. It's also possible that we can flip that on its head and that I can deal preemptively with the guarantee issue, under section 552, determine that you're either right or wrong with respect to the existence of commercially-reasonable determinants of value as of October 16 or as of September 15, as argued by the debtor, and you can either win or lose here.

If you lose here, that doesn't preclude your ability to argue against LBF that my decision here was predicated upon applicable bankruptcy law that isn't extant for their purposes. So I'm turning this argument right back

at you.

Why should this proceeding be stayed a moment when I can deal with these issues independently? Why should I stay these proceedings for a moment when the claims asserted here are, as I understand it, so large that they actually have a significant impact on reserves and distribution rights of other creditors? I'm not waiting.

MR. ZIMMERMAN: I understand that, and I'm never the one to ask questions when I'm standing at this side of the podium, but I'm not sure --

THE COURT: I reserve the right not to answer any question that you ask.

(Laughter)

MR. ZIMMERMAN: I can't do that -- well, I can do that, but then I'm in trouble. Because I'm not sure -- yes, you're flipping it, but I'm not sure that doesn't get, if I'm understanding you correctly, Judge, to the same place as my modified plan, which is this. If you are envisioning, hopefully, because we haven't really -- certainly, since we were moving to stay, I hope you understand we didn't fully proof all the merits, because that would be self-defeating.

There is a lot to brief on the 562 issue. The legal issues -- I assume you're not having a trial on the factual issues, but the legal issues, whatever they may be, whatever Lehman thinks they are, whatever the claimants

think they are -- if that's what you have in mind, I think your idea is fine and more eloquently stated than my modified proposal, because it was intended -- my proposal was intended -- you're right. If you conclude, heaven forbid, that we're wrong on 562, then that doesn't -- if it's a legal analysis, it doesn't interfere or preclude the claimants from getting whatever they can get in Switzerland. It just makes sure you never have to see us again. And so, assuming we have the opportunity to fully brief all the legal issues and we're not going to have a full-blown trial as to the facts, that is kind of what I was maybe suggesting as an alternative path, and if -- full stop.

THE COURT: Let me hear what Mr. Perez has to say, because he's standing up, even though Weil is not counsel for these purposes. So I'm going to presumably hear something about --

MR. PEREZ: Switzerland.

THE COURT: -- the LBF proceeding in Switzerland.

MR. PEREZ: Yes, Your Honor. Just very quickly. As the Court recalled, we were here before the Court on a motion to approve a 9019, which was approved. That 9019 had several conditions preceding. It has a drop-dead date of September 30th.

We have worked through almost all -- there's one minor condition precedent that we're still working on --

involves obtaining approval in another estate, and it was based on two things happening in the Swiss proceeding. One was the co-location plan, which is where the claims were allowed or disallowed. There were approximately 151 claims that were treated in the co-location plan that were guaranteed and probably another 20 claims that were treated in the co-location plan that were not -- that didn't have guaranteed claims here. Of those, approximately 15 filed objections, Tschira being one, and that's proceeding.

In addition to that, Your Honor, there is what's called the realization plan, and, in essence, the realization plan is the settlement between LBHI and LBF. What Tschira has, in essence, done in Switzerland -- the only party out of the 171 creditors is object and request an order from FINRA asking to have an appealable order so that they can, in essence, run out the clock and not allow us to conclude the settlement.

I mean, my interest is first and foremost in making sure that we don't lose because people run out the clock, and there is -- universally, everybody believed that the settlement was a win/win for both parties, and it's obviously a litigation tactic, kind of the best defense is a good offense, in order to object being the single party objecting to the realization plan in order to, in essence, either have the deal go away after four years of trying to

get it done or, alternatively, negotiate something on behalf of their client.

So I just wanted to put that into context, Your Honor, because you can't -- this is part of a whole picture, and I think that's a very important part. Thank you.

THE COURT: Thank you for that.

MR. TAMBE: If I may, Your Honor, just briefly, a couple of points? It seems to me where we are now is Your Honor is not prepared to rule today on the application of 562, but I would submit that everything that the Court needs to decide that issue is really -- comes out of their papers. It's already in the record.

THE COURT: Well, I'm not so sure that's true, and I'll give you a chance to complete your argument, but I believe there is a question as to what is meant by the language commercially-reasonable determinants of value in a setting that is as exotic as this. This is probably something that no congressman thought about. To the extent there is any relevant congressional history on this section, I doubt that anybody was really thinking about the cross-border aspects of section 562 application, and, if such considerations were, in fact, made, this is complicated by the fact that we have three bodies of applicable law potentially to look at and a proceeding, which as Mr. Perez

has explained, involves billions of dollars for the benefit of the LBHI estate, billions of dollars in claims represented by LBF that go away upon the effectiveness of the settlement and issues being raised by an entity that, as I understand it, is a foundation with a charitable purpose. So I assume that, from their perspective, they don't necessarily want to put themselves in the middle of this vice, but they're doing that, presumably because they're trying to get some value.

It is obvious from your chart that there is a material difference in outcome based purely upon market movements, depending on whether valuation is performed on September 15, 2008 or October 16, 2008. What a difference a month makes, but I still need a record to determine whether as of September 15 there were commercially-reasonable determinants of value. I'm unbiased on this subject, but I believe that, generally speaking, it is a heavy burden for the claimant to show that there were no commercially-reasonable determinants of value on that date or any other date, and I happen to believe that that language deals with markets that are so thoroughly broken that it is not possible as to the underlying asset to come up with a fair valuation.

Here -- and this is a major obstacle for the claimant -- the underlying assets are marketable securities

where you can readily determine market value, and there was a market for these securities on September 15, 2008. On that basis alone, I might be able to rule in your favor, but this is a very important subject, and it's one that I believe requires more than just a superficial assessment.

Claimant needs an opportunity to make an argument why October 16 is right. It may involve the use of experts. Lehman may require experts as well. I am not going to delay on this. I do not view this as a derivative of the Swiss proceedings. I view this as an independent claim matter to be resolved expediently with a briefing schedule to be determined by the parties, including such discovery -- and it should be truly targeted -- that may be needed to address what I view as a very narrow question.

With that, I suggest that you meet, confer, and develop an appropriate schedule that takes into account the truly relevant issues, which I view as being very interesting and significant but not terribly fact-intensive, and, as Mr. Zimmerman has requested, he would like an opportunity to submit some further briefing on the subject, and he'll have that right, as will you.

MR. TAMBE: That's fine, Your Honor, and we're happy to confer with them on a briefing schedule. I would just like to sort of set a parameter so we don't go off and get a six-month briefing and discovery schedule.

THE COURT: No, we are not going to allow this proceeding to extend beyond the break-up date for the LBF settlement. This is going to happen on a very accelerated schedule. This matter is not going to be held in abeyance while the claimant postures in Europe to gain financial advantage.

MR. TAMBE: I'll confer with Mr. Perez. We'll come up with a schedule, with that being said, Your Honor.

THE COURT: Consider this on a rocket docket.

MR. TAMBE: I'll see if they'll sign, Your Honor. Thank you, Your Honor.

MR. ZIMMERMAN: Thank you.

MR. PEREZ: Thank you. May I be excused?

THE COURT: Yes.

(Pause)

MS. MARCUS: Your Honor, the next matter on the agenda is in the adversary proceeding Turnberry Centra Sub, LLC v. Lehman Brothers Holdings, Inc. and a motion to dismiss. It will be handled by my colleague, Ed McCarthy.

(Pause)

MR. MCCARTHY: Your Honor, Ed McCarthy, here with Jacqueline Marcus and Loren Alexander (ph) and also a company representative, Christie Zull (ph). We're here on our clients Lehman Brothers Holding, Inc. and Lehman Bank FSB motion to dismiss count three for promissory estoppel of

plaintiff's second amended complaint, and that's adversary proceeding 0901062.

Your Honor, these aren't new issues for the Court. These issues are fully briefed once again, and they're before the Court. We think you'll be hearing some of the same arguments in those briefs and perhaps today, although we'd like to avoid it, but today here before you, I would like to make a few points.

First, why the law demands dismissal with prejudice once again. I want to highlight that, under the circumstances of this case, it is impossible for the plaintiffs, the Soffers, the set forth a credible claim under any of the three required elements for promissory estoppel, and second and important, I want to highlight why a dismissal is so important right now at this time in this case, and I'll do that through talking about the status of the litigation and maybe bring the Court up to speed. I'll take the points in reverse order, if I may.

To date, discovery is proceeding. We've already produced over 76,000 pages of documents. Documents have been reviewed, produced, gone through. Turnberry has also produced approximately 85,000 pages, and there's third parties that are involved that are outside that have produced about 40,000 pages.

The parties are in the midst of taking depositions

this week, over the course of the last months. Eleven depositions have been taken so far with four Turnberry reps being deposed and six Lehman reps, former and current employees. There's also been a third party already deposed, but we still have at least six depositions to take, and we have to schedule and complete those depositions in addition to remaining outstanding third-party discovery, which has been a little more burdensome to get.

We have not had the opportunity to depose the Soffers yet, the actual plaintiffs in this case. We've had them set for deposition on several occasions, but those depositions have been taken down and removed for a number of reasons by opposing counsel. We do expect to depose them later this month, if not early next month, we've been told. We also haven't had a chance to depose a 30(b)(6) witness on this matter in Town Square. There is work left to be done, and we are working to complete those depositions and the discovery as quickly as possible.

We need to confer on other remaining matters, including whether there's going to be any expert retention requested in this case. My client doesn't see that this case is the type of case that will need experts down the road. We think the Court is an expert on many of these issues without the need of anybody outside. Of course, the Soffers may disagree, and we'll need to confer on that.

I say this because streamlining this case at this point, given the significant discovery that's remaining, given the significant briefing that we expect to occur on summary judgment later this year and not even taking into account any issues that may remain after that for the Court to hear on the facts, you will hear that it makes sense to wait, but this Court shouldn't decide this motion to dismiss. Wait 'til summary judgment. It's right around the corner.

You'll also hear that there's no harm in waiting. Your Honor, that's simply not true, and it's simply not supported by the law or the facts.

Waiting here, asking to wait here would put us in a similar position as we were when the Court had to face the fraudulent inducement claims that you've heard earlier in this case, where it turns into a side show, where the Court can no longer focus on the actual loan documents at issue, the critical claims, the core of these disputes, the actual executed, signed agreements. What happens here with claimants' promissory estoppel claim is it muddies the otherwise straightforward arguments that are in this case, the otherwise remaining arguments, which are about the actual loan documents, and that's because of the procedural position that this case is already in.

Your Court will remember that we've already had

dismissals and a number of hearings in all of the claims and the cases between these parties, but, in all of the cases before this Court where these parties are present where you have the two Fontainebleau cases, the Mezzanine and the Senior Loan, and, of course, this Town Square case here, the only claim that remains, this promissory estoppel claim that's before the Court today is the only claim where the issues are, once again, as prior claims that have since been dismissed or withdrawn, are outside of the actual loan documents that are the heart of these disputes.

THE COURT: But how does that affect your discovery plan? In what way is Lehman prejudiced by having these cases include this claim pending summary judgment? I'm just curious as to what the consequences of deferring will --

MR. MCCARTHY: Absolutely, Your Honor. Well, I mentioned earlier, Your Honor, that Your Honor faced a similar position when we had to hear argument on motion to dismiss regarding the Repo 105 claim.

THE COURT: Right.

MR. MCCARTHY: And I think Your Honor will remember that the primary argument during that argument was about Repo 105. It took up most of Your Honor's morning one morning. Then, because we couldn't focus on the actual loan documents, the actual core of these complaints, we had to

take the time and the Court's time to take up Your Honor's docket with briefing, which was very expensive, and arguments, which took time from you to hear those issues, only to have them withdrawn later and turn the Court's attention to new issues. Now, namely this, again another speculative claim.

So, while most certainly a lot of discovery has already been taken in this case, most of that discovery -- not most of it, but a great portion of that discovery focuses on whether there was some far-fetched promise for long-term financing, and not only the far-fetched promise for long-term financing, whether there was this three-way deal between the parties, and this is the only claim that remains that relates to that. So, when Your Honor does need to face perhaps summary judgment, which we expect to happen later this year, we don't want to have this claim, this promissory estoppel claim, again turn into a side show that we believe it already is and has been once.

We don't want it to turn into the side show that the Repo 105 argument was and took up this time, because that costs money. We've now had to brief this promissory estoppel claim twice fully, and we're spending a great deal of time on discovery, hearing it, taking depositions, and hearing about the claim. So it does cost time and money, Your Honor, and not only that. I think it diverts the

Court's attention and the parties' attention from the core issues.

Now, in the meantime, that delay in waiting to hear the core issues is harming the -- the delay in stalling this case in order to focus on things that are outside the actual documents is allowing other claims to move forward quicker than this claim against the Soffers. I think Your Honor has heard before that there are other cases that are moving forward faster than this case, and, every time we check, we actually find new cases that the Soffers are involved with that are moving.

For instance, just this month, we found out the basis of another claim they're involved with that's here in New York State Court that relates to a deficiency judgment. That case is moving forward towards a damages trial this month here in state court, and that case actually relates to the Town Square matter.

It's the matter where the Soffers sued to try to prevent foreclosure, claiming that another lender, just like Lehman here in this claim, supposedly promised long-term financing, and now the damages portion of that claim is set in New York.

Your Honor, Lehman deserves a chance to get in line for collection, and streamlining this case now will allow that to happen. It needs to move this case forward.

That's why we're so adamant that this promissory estoppel case claim has no support. It doesn't apply here. That's why we're so adamant that there's no cases that support their claim.

There's no factual cases that are on point and controlling, and that makes sense here, Your Honor. It's not credible to believe that sophisticated parties like this with in-house and outside counsel would take the time and the expense and the risk of negotiating and executing loan documents that place the Soffers personally as the borrowers for that loan documents, if they didn't expect that those loan documents would control the relationship between the parties. This isn't even close to what the 2nd Circuit describes as the narrow doctrine of promissory estoppel.

There's no injustice here. What happened here is the Soffers ignored obvious business risks. They don't like the terms of the deal they negotiated, they executed, and they accepted tens of millions of dollars under.

As to the first requirement, Your Honor, of promissory estoppel, we think the case ends here. There is none, and there could not be a supportable, unconditionable promise for long-term financing, and the primary reason is because of the actual loan documents at issue here. None of the loan documents mentioned this purported far-fetched three-way deal. None of the loan documents mention this

purported long-term financing.

This case is about a $95 million loan, a loan that Lehman made to the Soffers personally, and a loan that the Soffers sued Lehman on and started this adversary proceeding on the twice-extended maturity date of that loan in order to try to delay repayment, delay living up to their contractual obligations. The terms and the nature of that $95 million loan by itself makes this claim unsupportable, and, Your Honor, although this case has gone on for some time, I don't think we've had the opportunity to talk to Your Honor about the very nature of that $95 million loan, this interim financing and why it goes into place in cases like this and deals like this.

Interim financing of this nature, this $95 million loan, only goes into place because the property is not ready for long-term financing. If the property was ready for long-term financing, we wouldn't be here on this $95 million loan.

The borrowers and the lenders would have just moved forward with long-term financing, but the interim financing goes into place because more construction needs to happen at their property, which was the case here, or because the lenders need to complete more due diligence before they could ever commit to long-term finance, which was the case here, and it goes into place because parties --

and this is critical here -- need time to consider whether the property is going to perform, where the leasing will start, and whether the property will bring in income, the net operating income that would support the type of long-term financing we're talking about here, and that's in the record for this Court in the mortgage loan applications. It's a huge condition to ever providing long-term financing. Will the property hit the NOI, the net operating income, that would ever support long-term financing?

Your Honor, the nature of these loans themselves, this $95 million loan, because no lender would ever commit to long-term financing when that's in place, makes it unbelievable to state a claim that Lehman made a non-conditional promise for long-term financing. No lender would have.

With that in mind, the actual terms of the $95 million loan just put this claim to bed, because their promise -- it not only contradicts, you know, maybe meaningful or just some side terms of the $95 million deal. Their supposed promise for long-term financing contradicts the very core terms of the $95 million loan.

It goes to repayment. In fact, it extinguishes the supposed promise for long-term financing. Extinguishes all the obligations of the borrowers to repay the loan, and it puts all the obligations of the borrowers right on the

lender, as if the lender had promised that I'm going to repay the loan myself.

Your Honor, of course, the integration clause, as you've rightly decided already once, bolstered our argument here that because the loan documents included a full and complete agreement, that alone makes their argument for long-term financing unsupportable and dismissal is required, but, even without that integration clause, the very terms of the loan documents make it impossible for them to support a credible argument here.

This loan is to specific borrowers, the Soffers personally. If the parties had intended for the terms of this loan to not apply, it would have been easier and much less risky, especially for the Soffers, to use an entity, an STE to be the bulwark of this $95 million loan. Your Honor, that's not what happened here.

My client was very careful in its decision that it needed the Soffers to personally be the borrowers on this loan, and it needed the Soffers to promise to repay this loan in contracts and in writing. Your Honor, they're not contradicting one term of the agreement. They're contradicting the entire contract and flipping it on its head. At law, for that reason alone, the promissory estoppel claim fails.

Second reason there could never be a supportable

promise -- there's no specifics at all, Your Honor. This complaint contains no specifics that -- specifics that are required at law regarding the supposed long-term financing. The Court already dismissed this claim once.

For whatever reason, the Soffers did not take advantage of the opportunity to come to this Court and amend their pleading with factual support. As the blackline we've provided to the Court and that we've received from plaintiffs' counsel identifies, their amendments are minor, and they're wholly conclusory. The amendments add zero new factual support.

What we're here on, Your Honor, is a redo, a redo of the first motion to dismiss, a redo of their motion to reargue. We're here on the exact same conclusory facts.

Again, the plaintiffs point to the same affidavit of Brett Ersoff, their only factual support, but the Ersoff affidavit, as we've discussed before, merely just recites the same conclusory and bare-bone statements that are in the complaint.

For example, Mr. Ersoff states in his affidavit, which is ECF -- attached as ECF No. 63, for the Court. He states that, quote, "Lehman offered an agreement," and, quote, "Lehman promised." Those are the details he provides about this supposed unconditional, clear, and unambiguous promise.

Nowhere in the Ersoff affidavit or the complaint does it state the where or the when or the form or, importantly here, the when, whether it was before, during, or specifically when after the execution of the $95 million deal. In significant instances, the Ersoff affidavit actually contradicts the complaint as to whether there was a promise. For instance, the complaint alleges that it was Brett Ersoff who promised for long-term financing, but, if you take a look at the Ersoff affidavit actually, it doesn't say that. Mr. Ersoff says bare-bones Lehman promised long-term financing.

THE COURT: I'd like you to comment on two paragraphs in the amended -- the second amended complaint. And I agree with you that the changes are relatively minor. But two of the more obvious changes are paragraphs 52 and 53 of the second amended complaint.

Paragraph 52 reads defendants promised to make the town square loan both before and after the execution of the interim advanced loan agreement.

Paragraph 53 reads the purported integration clause in the interim advanced loan agreement for a short term loan of $95 million to Jeffrey Soffer and Jacquelyn Soffer individually was not intended to, and did not have any application to the $625 million town square loan, which was to be made to a single purpose entity established to own

and operate town square.

In effect, those two paragraphs make the same argument you just made that this was a loan to individuals, and as a result, the integration clause really doesn't apply as to a promise made to provide $625 million worth of special purpose entity financing to entities related to the Soffers.

To what extent does the allegation both before and after in paragraph 52, and the references to a loan being made to related, but different, parties represent material changes that I should take into account for purposes of evaluating a motion to dismiss?

MR. MCCARTHY: Your Honor, we discuss this a bit when we were here on the motion to reargue. And I certainly had a chance to consider it further since then. Your Honor, these are not changes that in any way should change Your Honor's analysis that was made previously on the first motion to dismiss, and the analysis that was made rightly on the motion to reargue.

Your first -- these allegation on paragraph 52 and 53 are barebones. We're talking about before and after execution. It's just like you're putting the word in writing. Your Honor, they don't provide any factual support for the timing. They just make a bare bone allegation. But moreover, I would love to know who this special purpose

entity is that we're talking about here. I would love to know if they're a party to this dispute, but they're not.

The parties to this dispute are Jeff and Jackie Soffer, who signed the $95 million loan, and who are parties to that loan that absolutely include an integration clause. And they're trying to avoid repaying that loan. That's why they brought that claim in the first place. The timing says it all. And the nature of their claims all the way along says it all.

They brought this case against Lehman to avoid repayment. The $95 million loan that they're parties to, that they signed and include in the integration clause.

So, as I see this argument, Your Honor, it really is just a sideshow. Even if you find that some special purpose entity may have some claim against Lehman moving forward, that's a separate adversary proceeding. That's separate from the claims against the Soffers here that are at the heart of the dispute, and that are holding up Lehman's collection on its standing loans.

So, if they would like to move forward with some claim by a special purpose entity, we can try that case. And we can see if there's other reasons, and I think we'd have plenty of other reasons why it wouldn't -- there is no clear and unconditional promise. And it would have been unreasonable for that special purpose entity to rely on any

such promise because of the mortgage loan applications because of the -- a number of other factors which we could address, but that's not the case here.

The case here is against Jeff and Jackie Soffer. So, we see this as a total red herring, Your Honor. It doesn't have any support. And moreover, the timing that's addressed here, that it's before and after. As I see this, the timing of the alleged promise, if anything, it makes it more unreasonable for all of the plaintiffs and especially Jeffrey and Jacquelyn Soffer to rely on misrepresentations that were made after they've already negotiated, and executed, and exchanged money -- accepted tens of millions of dollars under the town square loan.

Their claim -- their argument is essentially, and they've -- they've essentially laid on the sword on that, right, saying we agree with Your Honor. We can't get around that that you've said we can't rely on such promises before the execution of the loan. But now what they're saying is the day the loan was executed, they're allowed to just rely on the exact same promises. They're not saying that there's something new. They're saying we knew it was unreasonable before the loan.

But now we're able to say, it's not unreasonable any longer notwithstanding the fact that we know the loan has us as the borrowers. And the loan has the other parties

to that loan, the Turnberry Centra Sub and all the other -- as parties to those loan documents, which are fully integrated again. They're saying now it's reasonable for us to rely.

And, Your Honor, given the breadth of these deals. Given that these parties, including whatever special purpose entity they're appointed to. And by the way, that special purpose entity would without a doubt have been owned by Jeff or Jackie Soffer, or a combination of both. We're not talking about some outside entity that had no relationship here.

Given the breadth of these deals, given that these parties have -- are experienced businessmen that have borrowed money from financial institutions in the past, where written commitments are always the norm, it would have had -- been unreasonable at any time for the Soffers, or any Soffer-related entity -- and it certainly would have been unforeseeable for Lehman that they would have relied on a supposed handshake deal.

And the timing point really is brought to a head by us, I think, in the loan extension agreement to which are before Your Honor. The $95 million town square loan, yes, was entered into in a specific time in mid-2007. But the parties, because they knew that they weren't going to be able to put long term financing in place as they thought

they might originally, extended that loan twice. And they didn't just extend the repayment provisions. Coming right from both extension letters which were in January 18, 2008 and then July 10, 2008, and there's no allegation here that promises were made after July 10, 2008. That would have been absolutely unreasonable given where the markets were at that point in time.

But coming right from the extension letters, "except as specifically modified and amended herein, all other terms, conditions, and covenants contained in the loan agreement, in all of the loan documents, shall remain in full force and effect."

Your Honor, these loan documents don't just take place at one point in time and then we can forget about them and pretend they never existed moving forward. These loan documents were extended twice at the request of the Soffers, right up until the very day that they brought suit against Lehman to avoid paying that $95 million loan.

So, to answer your question in finality, and if I haven't, please let me know, Your Honor, I don't think there's any important in 52 and 53 in the complaint.

THE COURT: All right.

MR. MCCARTHY: The final reason why there could never be a clear and unconditional promise for many entity, whether the Soffers, or the (indiscernible - 01:08:54), or

anyone else, is because of the mortgage loan applications that are before you -- before the Court.

This application, the one we provided Your Honor, is the final one that was exchanged between the parties. It's clearly the document they're relying on and saying that the terms of the agreement, although they don't say what the terms were, were agreed upon, length of time, all the other things. This is the only document they're relying on.

And, Your Honor, there simply -- under New York law, you simply can't support a claim for promissory estoppel any part. And this goes right to this -- whatever this SPE is, because this is what they were negotiating. Under New York law, with a (indiscernible - 01:09:27) preliminary agreements, these term sheets gives a lender the option to decline to lend, makes any commitment conditional, such language "vitiates any claims by the plaintiffs that the prospective lender have made a clear and unambiguous promise." And that comes out of In re: 50 Pine. The Bankruptcy Court for the Southern District of New York in 2004. There, the Court granted a motion to dismiss, notwithstanding there were executed term sheets that were conditional.

Here, Your Honor, the parties don't even have executed term sheets. They just have conditional terms sheets, which were never signed or finalized. So, I think

this also goes to this new argument that there's some entity that was negotiating long term financing, or that timing made it different.

Each parties were, yes, negotiated for long-term financing, but the writing they're supposedly relying on to say there was a promise makes it explicitly clear that any promise was conditional, and (indiscernible - 01:10:17) where you have a conditional promise, on a motion to dismiss, the promissory estoppel claim fails.

Your Honor, I could walk through that (indiscernible - 01:10:24) application, but I won't. You have it before you, and in our briefing we've outlined the numerous times where there's conditions that even if the term sheet was signed, which was an in bold requirement on the last page of that (indiscernible - 01:10:37) application, it still has many conditions that would have needed to have been met in order for the promise to be unconditional.

I will point out just one. On page 7 of that application that's before your Court, Lehman's obligations were always subject to due diligence. And Mr. Meister pointed this out when he was looking at that mortgage loan application in this Court on the motion to reargue. This looks like a conditional promise to me.

Your Honor, a conditional promise cannot and does

not support a promissory estoppel claim. And, in essence, gives us grounds alone to dismiss that claim right now.

The Courts are dealing with the argument, Your Honor. There are other new argument in addition to timing that they've raised here that he parties had some courses dealing -- make more reasonable for them to see this as a promise that was unconditional. I've struggled to understand this argument.

And when I've looked at it now, I think I have an understanding of what they're doing. But as Lehman sees it, any dealing between these lenders and developers was the same as the course of dealing with all lenders and developers of this size, that no lender in their right mind would agree to extend funds like this. And there's no allegation that Lehman ever did extend funds like this, without there first being written documents that put the terms of their agreement in writing.

In other -- the flip side, no borrower or guarantor would ever accept funds or accept liability, and there's no argument here that the Soffers ever did without first having your agreement in writing with the terms of that agreement in executed, enforceable documents.

So, instead what the Soffers are saying, they're not saying that Lehman agreed -- lent money in the past without executed documents. What they're saying is, we were

always successful in the past, Your Honor. When the parties started negotiating deals in the past, we were always able to reach an agreement. Whenever the parties started their negotiations in the past and the times were great, we were able to get to the point where we started negotiating loan documents, which never even happened here. We were able to execute those loan documents. And only then were we able to exchange money under the terms of those loan documents.

When times were good and the market was great, the parties were always able to come to terms on their agreements.

Your Honor, the Ersoff (ph) affidavit supports this reading. He doesn't say there's any unique relationship between these parties. What Mr. Ersoff says in the affidavit they relied upon in tacit or complaint, and this is at paragraph 2 of his affidavit, he says the Soffers were valued clients, without a doubt. And he says "the relationship with these clients, and others like them."

The relationship between the Soffers and Lehman, and all valued clients were such that they would come to terms "on an oral and informal basis, and documents would then be prepared at a later time." He's saying that the relationship between these parties, and all valued clients at Lehman were such that, yes, we would kind of shake hands, and say let's move forward and negotiate. But then you

would always have final written documents prepared. And only then would money be exchanged under those documents.

Your Honor, what they're trying to do is supplement their wholly conclusory arguments and allegations regarding there being an unconditional promise, which they don't have, with wholly conclusory and, in fact, contradicted arguments about there being a course of dealing. At best, they're saying because of their past success when the market was great, this Court should allow them to ignore business risks here.

Your Honor, the law is clear --

THE COURT: I don't think they're saying that. I think what they're saying is for purposes of a motion to dismiss, they should be entitled to put forth some evidence to show that the relationships between Lehman as lender and the Soffers as borrower were in a special category, particularly as it relates to the linkage of the Aventura Mall Securitization, which you haven't mentioned today, but I've certainly heard enough about that already, and these other transactions.

So, this was all part and parcel of an integrated relationship.

MR. MCCARTHY: Your Honor --

THE COURT: What I'm saying is, they're not asking me to believe that they're right. They're simply asking me

to give them a chance to try to prove that.

MR. MCCARTHY: Your Honor, I don't disagree with you that that's what they're saying, give us a chance, allow us to get to summary judgment. To get that chance, at law, they need to state a valid claim in their complaint and they haven't. That's why we're here today.

In allowing them to go forward and try to state that argument to you about this three-way deal with the Aventura Mall, and the Fontainebleau loan, and the Town Square loan when that argument is absolutely contradicted by the terms of not only the $95 million loan, but the terms of the fully integrated Aventura Mall loan, which doesn't reference this long term financing, the terms of the Fontainebleau loan documents, which are before you, which certainly doesn't reference this long term financing.

Your Honor, at law, when the supposed promise that they're relying on contradicts the core terms of enforceable written agreements, there's no allegation that those agreements aren't enforceable by the way, you cannot have a promissory estoppel plan. So, while they would love the chance, I think, and you'll probably hear that they want the chance to move towards summary judgment, Your Honor, at law, they are not entitled to.

There are many cases, the predominant cases on promissory estoppel, dismissed claims at the motion to

dismiss stage where the supposed long term -- the supposed promise contradicted the core terms of the written executed agreements. And that is the case here. Your Honor --

THE COURT: Why don't we hear from counsel for the Soffers at this point. I think we have spent more Court time on these pathetic claims than they are worth.

MR. MCCARTHY: Thank you, Your Honor.

THE COURT: I feel like a character in Groundhog's Day.

MR. MAJOR: Your Honor, Chris Major, from Meister, Seeling & Fein on behalf of the plaintiffs in this action.

The plaintiffs, by the way, Your Honor, which include the SPE that is the party that was to receive the loan, it's the first named party. It's Turnberry Centra Sub, so I'm surprised that Mr. McCarthy is at this stage of the case, having sat through 11 depositions, and reviewed all of those hundreds of thousands of pages of documents, and having spent such time, having moved against the pleadings repeatedly is not aware of what the SPE is, it is the title owner of Town Square. I didn't realize it was such a mystery.

What I'd like to focus on at the start, Your Honor, is we just listened to Mr. McCarthy's summary judgment argument. And him saying that I was going to stand up and ask for our opportunity at summary judgment doesn't

mean that's not a valid point.

We're in the process of taking depositions. We've got six to go, as Mr. McCarthy stated. And by the way, Your Honor, if you were to dismiss this claim today, not a single one of those depositions will go away. Every single deponent who's scheduled to be deposed is either being deposed, with respect to the non-parties, exclusively for the Fontainebleau adversary proceedings, or it's the Soffers, Mr. Ersoff, who we've yet to have a date prompt from Lehman, and Mr. Walsh, I believe, who are going to be deposed on all of the deals anyway.

What they're basically asking is for the Court to rule today, before we finish discovery, so we're limited in asking a few of the questions that we would ask in some of those depositions.

THE COURT: I don't think that's exactly right. I mean, we've been -- with respect to the arguments you're making, we've been dealing with your right to pursue promissory estoppel claims for a very long time. This is at least the third hearing that we're having full blown oral argument over these claims: the original motion to dismiss, the motion for reconsideration, and the right to file an amended -- further amended complaint, and now this motion to dismiss.

And my reference to Bill Murray in Groundhog Day

is not intended to be entirely facetious. Each argument is essentially the same. We are not really advancing the process of judicial economy by taking this to the level of a triplicate, instead of simply dealing with it neatly. I dismissed these claims once. There was a request to file for reconsideration, which I denied, or to file an amended complaint.

What we're doing here is not bridging to summary judgment. We are testing the sufficiency of allegations based on promissory estoppel. They've been thoroughly briefed multiple times. And the fundamental question for me is, to what extent does your second amended complaint represent a cure of earlier deficiencies noted by the Court? I'd like you to focus on that.

MR. MAJOR: I'll get right into that, Your Honor.

The -- when the Court dismissed the claims the first time, the Court had one ground for dismissing our promissory estoppel claim, and that was the integration clause in the $95 million loan document. We argued, and the Court has disagreed with us, we understand that, that the $95 million loan agreement integration clause was limited to that specific loan and didn't cover outside loans.

We asked for one opportunity to re-plead in order to correct what the Court found to be a defect in the pleading. And that was the right to plead that the promises

were made after the integration clause was executed in July of 2007.

The Court granted us that right. And when the Court did it, the Court wrote Lehman opposes granting leave to amend on grounds that the proposed amendment would be futile because plaintiffs will never be able to meet all of the legal requirements applicable to a claim of promissory estoppel. The Court continued, it is premature for the Court to foreclose the right of the plaintiffs to pursue this claim, even if the likelihood of being able to demonstrate reasonable reliance is uncertain or remote.

We corrected the integration clause defect, which is the only one that's been identified by the Court by --

THE COURT: Yes, but you didn't provide any facts. You simply said before and after. You didn't say anything that a rational observer could say, has any likelihood of success. There's a plausibility standard that applies every time I'm considering a motion to dismiss. You knew you were going to be tested on this again. You knew that any deficient pleading was going to give rise to a further motion to dismiss. And these amendments are, with respect, grease bare. You don't say much.

My conclusion is you don't say much because you don't have much to say.

MR. MAJOR: Your Honor, we have alleged the

specific terms of the loan that were promised. They were promised over a more than one year period. We're not required under the rules to plead every single date on which the promise was made.

THE COURT: If you want to prevail here, you need to do more than you did. You need to do more than just say conclusory things. You need chapter and verse. You haven't provided it, nor have you said today that you can. And my assumption is that if you could have done it, you would have done it. And the reason that you did what you did was to try to get past an obstacle. My challenge to you is, what would you say if you could say more?

MR. MAJOR: Your Honor, if I can get into the depositions that have been taken, these promises were made from the period of time that started in 2007 and they were made into the first part of 2008.

THE COURT: Not plausible. Not plausible in the context of a $95 million personal loan that includes an integration clause. It is not plausible that sophisticated parties would rely upon anything not in writing. Not plausible that sophisticated developers would simply say, okay, because you just said that to me, we have a handshake deal, I'm going with you. I'm not going to look at other alternatives. Not plausible.

We are not dealing with a consumer loan. We're

not dealing with boilerplate documents. We're dealing with a very sophisticated transaction. A reason why the integration clause in enforceable. A reason why I enforced it. And to make the statement, statements were made before and after without specificity, raises credibility issues.

MR. MAJOR: Your Honor, the specific terms of the loan were promised repeatedly by Lehman to Turnberry, $625 million, a ten year term, the interest, the method of calculating the interest, the terms of the loan. Mr. McCarthy has cited to the fact that there may be conditions to closing that loan. That's not what the promissory estoppel test is, it's whether the promise --

THE COURT: That's not the basis for a promissory estoppel claim that these individual defendants can assert when they have an integrated $95 million loan that they owe. This is not a credible position you're taking.

MR. MAJOR: Your Honor --

THE COURT: The $625 million take out financing deal never happened. And if it was going to happen, it would only happen as counsel for Lehman has argued, if all conditions were fulfilled. You have not asserted a cognizable promissory estoppel claim.

The motion to dismiss is granted. And I strongly urge the parties to go back to the settlement table, and act like grown ups in this case. Enough is enough.

MR. MCCARTHY: Thank you, Your Honor.

MS. MARCUS: Your Honor, the final matter on the calendar today, number 4, will be handled by Arthur Steinberg on behalf of Lehman.

MR. STEINBERG: Good morning, Your Honor. Arthur Steinberg from King & Spalding on behalf of Lehman Commercial Paper, Inc. and LBHI. And this is an objection to claims 2885 -- 28845 and 28846.

In essence of the claims that were filed were an unspecified contribution and indemnity claim arising out of a 2006 dividend that was paid to the claimant, LBREP. And it was paid by SunCal, which is one of the debtors in the California Bankruptcy Court.

And Lehman was part of a lending syndicate that provided first, second, and then ultimately third lien loans to, in part, finance that dividend, but also significantly in part to finance SunCal's development of three residential real estate projects in California.

And so, we were sued -- we were almost sued. They had to come to Your Honor to ask for permission to try to invalidate our claim and to assert equitable subordination claims. And in September of 2010, Your Honor approved the settlement that we had. And then we went to the California Bankruptcy Court and the California Bankruptcy Court approved that settlement as well, too.

THE COURT: I was assuming I would never see you again.

MR. STEINBERG: Well, Your Honor, I hope to see you in lots of matters.

THE COURT: I understand. But at least in this setting, I was assuming that it was over.

MR. STEINBERG: Well, I actually thought it would be over as well, too.

Subsequently, the SunCal trustee sued to recapture the dividend from the claimant. And they entered into a settlement after discovery was had.

And when you look at the relative settlements that we both reached, we reached the -- the inevitable conclusion is that the SunCal trustee had a weak claim, so that the amount that the first lender group, who was owed $235 million had to pay in the form of use of cash collateral, giving up some recoveries, was about 11 and a half to $12 million of value.

The claimant was 90 percent -- received approximately 90 percent of the dividend. The dividend was $144 million received in 2006. Seven years later in December of 2012, they gave back collectively -- the full giveback was $16 million. The claimant's share was 14 -- or $13.8 million.

I think we say in our papers that if you kept $130

million and you just kept the money in an interest account and you got 1.9 percent on your money, that's essentially what they gave back.

And by the way, what they gave back of $13.8 million specifically to the claimant, had some insurance component, meaning that some insurance component paid some of that $13.8 million. They've never disclosed how much of it was actually paid by insurance to reflect what their out of pocket is.

Now, there are seven fundamental principles that I think we actually agree on, which kind of shape the underlying facts that I just talked about. One is that Your Honor may recall that when we went to Your Honor to approve the LCPI settlement with the SunCal trustee, there was an argument that they were raising that the lender to a dividend and the recipient of a dividend should be deemed to be joint tortfeasors for purposes of state law.

At that point in time, they were arguing New York law and we were -- we did letter briefing to Your Honor on the New York law and California law. But we will accept the notion that for purposes of the California statute, that we are joint tortfeasors, even though it doesn't fit within the natural paradigm of what -- how most people can -- joint tortfeasors act.

So, the first principle is that we're joint

tortfeasors. And the second that we both will agree that California law applies in that Section 877 and 877.6 of the California Code, Civil Procedure.

The third is that we raised this point, they don't challenge it, but I think it's worth saying is that you can ask for the good faith finding in connection with a settlement. You don't have to do it the same time as the settlement is approved. There's no deadline as to when you could ask for approvement (sic) -- for approval of the good faith finding. And that's the Gretchco (ph) case, which is cited in both our papers, and their papers for given propositions.

The fourth is that we agree what the standard is for good faith. It was set by the California Supreme Court in the Tech-Bilt (ph) case. And we argued that the proposition of what you have to consider for the good faith finding was essentially the same type of consideration that you have to look at for approval of a Bankruptcy Rule 9019 settlement. In their surreply, they take issue with that and say that there's this kind of nuanced position that you have to look at what the relative damages between the two joint tortfeasors.

I don't think that necessarily applies in our circumstance. But all that we actually did was replicate what they did when they went for their good faith finding

when they settled their case. And on Exhibit H to our moving papers, we set forth -- we included their memorandum of law that they presented to the California Court.

There, they make the same unremarkable propositions that we agree with when we file our papers. We essentially cribbed a lot of what their law was, so that there would be no disagreement on the issue. They say once the settling party has moved for a good faith determination under the Section 877.6, the opponent bears the burden of proving that the settlement was not in good faith. So, we agree with that and it's their burden to be able to show that.

The burden is a high hurdle, that's their words. The opponent, asserting the lack of the good faith can only meet this burden by demonstrating that the settlement is so far out of the ball park as to be inconsistent with the equitable objectives of the statute. The so far out of the ballpark is to me, and using of the words reasonable or reasonable view, is the same thing as you have to find in the 9019 the lowest range of reasonableness.

And then this is the significant thing that they say, which I think contradicts their papers. In fact, an opponent must demonstrate that the settlement is grossly disproportionate to what a reasonable person at the time of the settlement would estimate the settlers' liability to be.

Then in their argument section, they say Courts only need to consider whether a settlement is grossly disproportionate to what a reasonable person at the time of the settlement would estimate the settling defendant's liability to be. So, they're not asking -- they're not saying in their papers when they went in front of the California Court to say that you need to reflect what the proportionate liability of each of the potential joint tortfeasors. They say that the only test, which is what we said in our papers, the only test, and it comes from Pepco -- the only test that needs to be done is whether the settlement that we paid is grossly disproportionate to what a reasonable person would think that we should have to pay.

Well, that's what you do in a 9019 settlement. You notice it out to all of the creditors, and the issue will be is whether we pay a reasonable amount in view of what the exposure was. We were never arguing that we couldn't pay. So, there was no collectability factor. And clearly cost and expense is a factor involved.

But Tech-Bilt also says that you need to factor when the settlement was breached. So, we think we've met the standard and the standard is in Bankruptcy Rule 9019.

We cite in our papers the Plant (ph) case. And the Plant case actually says what I've just said. It said California courts have adopted a test comparable to

Bankruptcy Rule 9019 for determining whether a settlement payment is sufficient to justify a bar against equitable contribution rights.

And while they weren't dealing with equitable -- that specific provision, they were trying to show what the analysis would be in that circumstance. And they even say that the 9019 standard is actually more exacting because the proponent of the settlement has the burden of proof, while under the California statute, the objector has the burden to show that the settlement was not in good faith.

So, we think -- and by the way, the Hicks-Muse (ph) case that we cite says that if the applicable state law, which would comport with the good faith standard under Bankruptcy Rule 9019, the bankrupt, who is the settling party, may prevail on its contentions, but the settlement order will collaterally estop anybody from re-litigating the issue.

So, that is the essence of our argument. And I think even if that wasn't the case, it is obvious based on the facts that Lehman in this case, LCPI entity lost 80 percent of its principal of its loan. The equity players here recovered the full investment, plus a profit. They are holding the proceeds of the loan that we never got repaid.

We, to date, have never asked them to pay the pro rata portion of what we had. The notion that under these

circumstances that they're asking us to say that they overpaid vis-à-vis us is, I think, unusual. We were the lender to a borrower who made a dividend. They received the dividend. They were the recipient of the fraudulent transfer. They were the initial transferee, if it was a fraudulent transfer.

We lent $320 million in first and second lien positions for part of a lending group. Lehman's share of that $320 million was $82 million, and that, if you back out the dividend of $144 million, that's roughly 45 percent of the overall loan that was made. So, we were an actual lender to actually support the development of the project.

They were challenging our loan because the (indiscernible - 01:37:27) had gotten the dividend and they say that that left the company undercapitalized. But it was the borrower who made the decision to take the loan. It was the borrower who made the decision to issue a dividend. The equity claimant here is 90 percent controlling of the borrower. They didn't have to take the dividend. They didn't have to take the loan. They could have put the dividend back as the company was running into financial trouble. They chose not to do anything.

But fundamentally, the settlements that we both reached reflected the fact that they were, in the context of what we were sued for, they were de minimis settlements. We

were sued for telephone book numbers. They essentially gave back the interest carrier -- portion of the interest carrier of the money that they had received. They didn't touch anything else.

We gave up cash collateral usage to maintain our property. But for the purpose of which I argued to Your Honor almost three years ago is we needed to get to a sale. This was a volatile piece of real estate. We wanted to get to the market before the California market had dropped. With the benefit of hindsight --

THE COURT: You might have waited.

MR. STEINBERG: I might have waited. Someone else -- you know -- and by the way, the person who bought at the auction was -- they were part of the consortium that bought at the auction. And the auction price for this property was 70 million -- around 70 -- $71 million.

So, the equity at the time of the first, second, and third lien loan, and at the time of the filing of the SunCal bankruptcy had almost $400 million of secured debt ahead of it by virtue of the process of the sale, and then buying in at the auction price, they buy it for $70 million with no secured debt in front of it. That was their investment for $70 million.

They made a very good business deal. They made a smart judgment. They got out of $144 million dividend case

paying relatively a de minimis amount. Before you even factor in their insurance obligation, the notion that under those circumstances they have a contribution or indemnity claim against the lender at -- is, I think -- is unfounded, and Your Honor could easily see that there's no reason to take discovery on this, these types of good faith determinations are made by affidavit. They may bear determination by the affidavit.

I'm not even sure whether they think they have a good faith determination as against LCPI in the context of their getting a good faith settlement. Because I think as we mentioned in our papers, to do that, I think they needed to move to lift the automatic stay. But if you --

THE COURT: Mr. Steinberg, let me ask you a question because you're making some persuasive arguments, but they're not based upon a record. And I hear what you're saying and I have no reason to question what you're saying.

But even assuming that the good faith determination we're talking about is one to occur in a somewhat expedited fashion based upon declarations, or affidavits, or stipulations of fact, or representations of fact of some sort in a fashion that would otherwise be acceptable to a Court, what's before me today on the basis of which I can dispose of these claims by finding that 877.6 of the California Procedural Code is satisfied in a setting

in which both settlements took place with no good faith findings, at least no explicit good faith findings other than those inherent in a Bankruptcy Court approval of a 9019 settlement.

And at least there's the argument that some comparative assessment should be made in order to determine good faith, coupled with the argument that liquidity constraints somehow are at issue here, some $50 million that limited the ability to use the financing. I don't know how much of this is smoke and how much of this is real. I don't know how serious this whole fight over good faith is going to be lodged. And, at bottom, there's an aspect of this you haven't addressed at all, which is forum selection.

My working premise is that the claimant believes that there's a better chance of getting a result that they will find useful by having this heard before Bankruptcy Judge Smith in Santa Ana. And that the debtor entity believes that this is -- I shouldn't say what you believe, but you'll tell me, that this is all part of an organized claims administration process that properly should be heard and decided here. And that it's a relatively simple matter and that they should simply have their claims expunged without further adieu.

MR. STEINBERG: Let me try to address Your Honor's questions.

What's before Your Honor today, attached to our moving papers, are the settlement papers that we had filed to approve the settlement before Your Honor, the settlement papers to approve the settlement before Judge Smith and the settlement papers that they had submitted to approve their settlement with their good faith finding before Judge Smith.

Those papers contain all of the factual allegations that I have talked about which is the amount of the loans that were made, the basis of the settlement, the value of a settlement, what they paid in the context of settling their case.

So the relative loss that we've suffered, the amount of the loans that we suffered and their relative contribution and their dividend are not disputed. They're all set forth in pleadings that are before Your Honor and, if you review their papers, they don't contest any of the numerics, the facts.

They will say they paid $13.8 million in a settlement. I will say you have to factor in insurance. They will say, I'm not telling you what the insurance is. But that number is $13.8 million. We, out of the $16 million that the overall equity contributed, the amount of our loans, the amount of our recovery from the auction sale, is -- the amount of our loans, and they know what the recovery of the auction sale is. They haven't challenged

that. They've accepted our notion that our contribution is between eleven and $12 million, as a first lien lender group, and LCPI is 30 percent of that first lien lender group.

So there's no issue as to the numbers. There's no issue about that we were a lender to the fraudulent transfer and there's no issue that both of us took the position that there was no fraudulent transfer and there's no issue about what we were sued for versus what we settled at. So you can see the dramatic difference between the ad damnum clause in the proposed complaint and their actual complaint versus the actual amount that was there. And there's no issue about the timing of when everything occurred.

So all of the factual information here is before Your Honor already as attached to our moving papers and they don't contest that.

The issue about the form selection clause, the clause -- when they originally filed their change of venue allegation, they thought that the term sheet where we had consented to jurisdiction meant that we had to litigate this issue in California.

In their reply, they agree they recognized that it was a non-exclusive jurisdiction. In fact, they cite in their papers that when Your Honor approved the settlement, you specifically reserved jurisdiction to handle the

disputes in the case.

What they don't recognize in their papers, or have not acknowledged in their papers, is that Your Honor was very particular and was required to be that particular because he did have objectors to the settlement and they wanted to say, judge, approve the settlement but it's limited to the parties to the term sheet. SunCal trustee and LCPI debtor don't do anything to affect my rights. Whether it was Valpost (ph) who had the second lien or whether it was a LBREP who claimed to have this potential contribution claim. Limit the order to the parties.

So, they're not a party. They continually try to argue that they weren't a party and they weren't going to be bound by anything. So, therefore, a clause in a term sheet that talks about that there's a consent for our jurisdiction into California doesn't have any relevance.

But, as a practical matter, it didn't have any relevance anyway because I don't have a dispute with the SunCal trustee. I've consummated my settlement. There's nothing to go there. And, if you think about it, what they're really asking to have happen here is to have a non-debtor, LBREP, file an action in the SunCal Bankruptcy Court against another non-debtor to handle a portion of a claims resolution here.

I didn't have to move under the California statute

for the good faith finding. I could simply say that based on the admitted facts, there's no contribution claim. There's no indemnity claim. I just said it was cleaner because by virtue of having a good faith settlement that was approved by two courts, I essentially got to the same position anyway and that their statement in their reply that you need to take into account the concerns of the priorities between the joint tortfeasors, that is not the basis upon which they set the standard to the judge when they went for their good faith finding.

With regard to the liquidity concern, I think you just -- we don't dispute that there was a change in the liquidity covenant that took place before the loan. That's true. Then the borrower had the decision whether to borrow the money or not borrow the money. Then the borrower had the decision to decide whether it could meet its projections or it couldn't meet its projections.

They moved in front of the California Bankruptcy Court and said that as a result of the -- at the time that the dividend took place, there were current appraisals to say that the property was worth $970 million. In the context of litigating their resolution, they have this -- they had the issue as to whether the projections made sense or not made sense.

They ended up still settling for a de minimis

amount in the context of what they were suing for. But, in this case, the borrower had the decision to whether to take the loan or not take the loan. The equity had the ability that if liquidity had gotten tight to give back the money.

They claim that they gave back a portion of the money. They only gave back a portion of their profit. They didn't give back the full profit. That comes from their papers before. And they still made their profit on their investment because they held this money for seven years.

So you have, the liquidity concern is, I think, a smoke allegation. It doesn't matter. It didn't affect them in how they settled, whether they said that they paid a few million dollars more, that either their insurance carrier paid or they didn't pay. But in the context of this case, they were sued for $144 million. You factor in pre-judgment interest, they settled for less than ten percent of a dividend, which is really an open and shut case. They had a 90 percent discount on the issue of essentially solvency.

They were right. They just got out of a case because it cost them some money. This is not the kind of case where you sit there and try to figure out who was potentially at fault. We were both right. We paid a relatively small amount of money considering all that could have happened and the cost and expense of litigation and so did they.

And to argue now that after they paid a small amount when they're still sitting with a profit, while we lost 80 percent of our principal and they're sitting with our money that we lent in a dividend, we haven't -- we didn't ask for it back. But this is a case where the equity is sitting with the loan proceeds that were never repaid back by the borrower. And they want to say that in the context of this case there's a proportionality that needs to be allocated based on their having paid $13.8 million before insurance. That doesn't make any sense at all.

THE COURT: I understand what you've just said, Mr. Steinberg. But is that actually the analysis? Because whether they ended up benefiting from the proceeds of the loan or not probably is irrelevant to the question of whether the claims of the trustee against each party were settled in a manner properly within the ballpark.

So it seems to me that the question and it's probably a simple one, is recognizing that these claims were probably not very strong to begin with and, as a result, were settled for pennies on the dollar. Both of the alleged joint tortfeasors got off cheap. Cheap in the sense that as a percentage of the claimed exposure, it was a small percentage.

In that setting, how does one assess relative contributions?

MR. STEINBERG: Well, I think, Your Honor, that the Tech-Bilt case, and as they say in their own papers, you look at what a reasonable person should pay in the context of their liability to the plaintiff. Did they pay their fair share to the plaintiff. If they did, they're released out of potential contribution and indemnity claims. That's the basis upon which we had to get these settlements approved.

Did we pay a fair share to the SunCal trustee in the context of the settlement that had been agreed to? The Court found that it was reasonable, fair and adequate. That's --

THE COURT: So here's the question, I think -- or at least, here's a question I am about to articulate. Where you have a settlement with the SunCal trustee that is approved in the New York Bankruptcy Court and a separate settlement with the SunCal trustee that is approved by the California Bankruptcy Court and the settlements are made by parties that are arguably, in fact, you've stipulated to this, joint tortfeasors for purposes of the California Code, Section 877 and 877.6, does a good faith finding need to be made at all if there are existing, separate 9019 findings that the settlements, viewed separately, necessarily are fair?

MR. STEINBERG: Your Honor, I think the answer to

that question is that normally the good faith finding is sought before you know the full story. While one party settles, there are other parties that the litigation is going forward and in order to encourage that settlement, they are asking for releases of indemnity and contribution claims.

This is an easier case for everybody because you don't have to sort of speculate what the potential ability of the plaintiff to pay. You actually know what everybody paid here and now you're assessing back as to whether, at the time you approved it, it was reasonable.

But the standard is the 9019 standard, especially -- what happens in these cases where they raise the proportionality issue is when somebody doesn't pay anything and the trustee just drops the case and says, for costs, you know, so I don't have to incur potential costs, I've now think that this claim has no potential merit. And now someone goes to approve the settlement and someone says, all right, but you've now pended off contribution rights and the plaintiff not -- didn't get anything and you're jointly and severally liable for this debt. You're putting a greater burden on the non-settling defendants.

We accepted what they've said about the joint tortfeasor thing. But we didn't have the same claim against us. When we -- ours was a challenge to our claim as whether

it was a good claim or not a good claim, as a secured basis because a portion of our loan proceeds had been paid on a dividend.

Theirs was that they had received a dividend at a time that the trustee was alleging is a fraudulent transfer. It's an apple and an orange. It's not two apples and therefore it doesn't fit within the normal paradigm.

In a circumstance where you have the settlement actually done, you understand that it's been approved with notice to everybody and someone has made a finding that is reasonable, that your contribution to this estate is reasonable. And it's not being discounted for ability to pay, or anything like that. It was just determined that the claims as valued against us were worthy of the settlement that we had just reached.

And Your Honor may remember that this was also -- came with the endorsement of the creditors' committee as well, too. So there was -- the creditors were represented as well as the trustee, all who had made the determination that we had paid our fair share in the context of resolving our claim.

They also agreed down the road to agree -- that their settlement on their dividend recap was acceptable. The fact of the matter is, Your Honor, you asked us to focus in on the liquidity issue. The trustee didn't believe that

even that was a good fact for them. It may have been a good fact but it didn't get them very far based on the settlement that he reached.

It may have been something that he banged the table with and said therefore you should pay another million dollars when you owe us $144 million. But it wasn't anything more than that. It wasn't like they took this fact and said I'm taking a claim and now you have to pay fifty percent. And they came back and they said they had paid fifty percent of the dividend.

This is the unusual case where you have two de minimis settlements and someone saying, I paid a little more of my de minimis than you when we're not in the same position. The trustee settles with us as you -- just to recollect from what happened in 2010, I have property that was worth nothing close to what the aggregate debt in this case, which in the first, second and third lien debt, were $395 million. The trustee had an appraisal saying it was worth $50 million.

So we said to the trustee, assume that the dividend was no good. You know, assume -- knock out $144 million of my secured claim. I'm still owed $250 million. Your property is worth -- you say that the property is worth twenty percent to twenty-five percent of what would be otherwise my valid secured claim. Where are you going on

this litigation? You don't have anything as against us. We need to sell the property. It's on your watch. We're just burning cash collateral to maintain properties that are bringing into the market. And that's what should happen here. That was the basis of our settlement.

That's a totally different analysis when you look -- they were naked. They had gotten the money. Either they -- he has a good claim or he doesn't have a good claim. He determined that he potentially didn't have a good claim. But this is not a case where there was a construction on a building and the issue is whether the carpenter or the electrician created the default that led to a fire then had to handle proportionate liability. You never really would have handled proportionate liability based on this before. You would have looked to see whether we had an exposure based on our conduct that would justify that -- our settlement.

And both you, Your Honor, and the California Court, both made that determination that it was a fair settlement. I think the California Court said it was well within the range of reasonableness here. No one objected and we have the support of the committee. Everybody understood our settlement was a good deal for the estate.

THE COURT: Okay. So Mr. Steinberg, in this setting, you've both told me that there is an agreement

among the parties that this proportionality requirement of Section 877.6 applies. Yet, it's really being misapplied because the circumstances of these separate settlements do not fit the paradigm for joint tortfeasor analysis.

In that context, how, if at all, should a court make the judgment that the settlements are in good faith for purposes of that California Code Section?

MR. STEINBERG: Your Honor, I actually said that the proportionality aspect doesn't apply in our case and that Your Honor still should be able to make the determination based on what they've cited in their brief, which is, I'll read it again. "Courts only need consider whether a settlement is grossly disproportionate to what a reasonable person at the time of the settlement would estimate the settling defendants' liability to be."

That's not a proportionality of whether I'm more at fault than they're at fault. He set forth the test. They've set forth the test of what needed to be applied to them and I'm saying to Your Honor, apply the same test here. That is the Bankruptcy Rule 9019 test. And it's actually already been applied. It should apply here as well.

If Your Honor doesn't want to apply the California statute, if you recognize that I really have said to you that parts of it is an apple and an orange, you could look at this straight because the settlements have actually

occurred.

Is there a valid contribution claim based on what they paid and what they received versus what we paid and what we received in the context of how we settled the case? You could get to the same spot without reference to the California statute either because the facts aren't in dispute.

THE COURT: Understood. But how we you get to that result? How would you determine that there is no valid contribution and indemnity claim? How do you, today, as a matter of law erase their claim?

MR. STEINBERG: Because we know what the result was of what they paid. We know the result of what we paid. We know what our loss was. We know what their loss was. We know what the claims were that were asserted against us. We know what the claims were that was asserted against them. That's all the facts that you need to know to see whether there is a contribution claim.

Your Honor has it easier because many times you're asked to look at this stuff before you have the full picture. You have all the picture here. No one is quarrelling as to what that picture is.

The issue is something that they have. They've agreed that the California statute applied. They've set forth what the test is. The test doesn't have what

proportionality, at least as far as they asserted it in the California Bankruptcy Court and we're saying to Your Honor that the case law that we cited says that the 9019 standard is the California standard for purposes of assessing this situation.

And Your Honor has ruled and the California Court has ruled that the 9019 standard has been met a fortiori it should be met here as well. You have all of what's needed to make these resolutions and this certainly belongs before Your Honor as a claims resolution matter.

THE COURT: So, let me sum up and then give Mr. McKane an opportunity to say a few words because I can see how impatient he is to jump up and have his day in court.

Your position, in summary, is that where a bankruptcy court has approved a settlement under a 9019 standard in New York and a California bankruptcy court has approved a separate settlement under 9019 standards in California that, as a matter of law, it is not possible in interpreting Section 8.776 of the California Code to find that either settlement is grossly disproportionate with respect to liability because each settlement has been separately approved by a court of competent jurisdiction applying an appropriate standard.

MR. STEINBERG: I'm not sure whether I would go that far, Your Honor. I would first add that the California

Bankruptcy Court also approved our settlement.

I do think that if there was a collectability aspect of our settlement, as the reason why our settlement would be approved, then I think that that may skew the factors a little because it would be something other than whether a reasonable person would say that's a fair estimate of our liability.

But in our case we didn't have a collectability issue and what all that any -- either of Your Honor or the California Bankruptcy Court had to determine was that whether we were paying a fair share based on the claims that had been asserted against us.

When a settlement is tailored for approval on only that basis and is approved on that basis then I would agree with you that that is the 90 -- that 9019 finding is the same finding that you'd have to make as a good faith finding.

THE COURT: Now, it's Mr. McKane's turn.

(Pause)

MR. MCKANE: I apologize for interrupting, Your Honor. For the record, Mark McKane of Kirkland and Ellis on behalf of LBREP Lakeside and while it's always nice to see you, I did not think I would see you on this matter after 2010.

And the reason why, and I want to go first to,

rather than prepared remarks, is to address everything that's been said to date in this argument, especially with some of the issues that you raised.

Let's go first to the notion of is this something real or is this smoke. And I respect that you would ask that question. What I would note is that Judge Smith in California would be in a better position to know that because Judge Smith didn't just evaluate our settlement. She also evaluated their settlement. She also lived with the underlying allegations for multiple years and dealt with the discovery as those -- as the claim that was about to be asserted and was then settled, the LCPI claim, and then the claim that was brought against us was litigated was handled.

And to the extent that there's any question about what is this joint tortfeasor aspect, the trustee in that case asserted a breach of fiduciary duty claim against both of us. He threatened to bring it against them. That was one of the reasons why they settled out. He then brought it against us. There's the joint tortfeasor. That's why they're not stipulating -- that's why they agreed to that concept.

But to the thing that you've said at the end, as you tried to package what Mr. Steinberg is trying to do here, and you said, yourself, like, you know, let me try to get this right and you characterized it as best you could

because you're focused on are you asking as a matter of law this is true. You have to ask that question because we're here at this sufficiency hearing.

We here on the basis of my claim on a Rule 12(b) standard and the basis on which they're trying to knock us out on a Rule 12(b) standard is this good faith finding under California law, that's 877 and 877.6 which by its statute is an evidentiary-based statute. And so the disconnect that you're struggling with is how can I deal with an evidentiary-based basis on what's supposed to be a sufficiency of the claim analysis.

And to their argument, which is a 9019 ruling, by definition equals an 877.6 finding. Here's why that's not right. When you evaluated this case, and approving it whether it was a good deal for LCPI, you evaluated the gives and gets between the settling parties, that you know, LCPI and the SunCal trustee, without regard to third parties.

And, in fact, you put that in your order, properly so. We asked for you to put that in your order. So did Vander (ph) for Scadden (ph) on behalf of the second liens because it was -- that was the matrix in which you were evaluating that analysis.

So true what's straight up 9019 analysis when we settled out, we, LCPI -- sorry, LBREP Lakeside, when we settled our claim against the SunCal trustee. So you could

have a evaluation under 9019 when between the settling parties you may say that's a fair deal.

The question that is unanswered, the question that Tech-Bilt required, and Tech-Bilt's a California Supreme Court case, is, is there proportionate liability? To get a good faith finding to cut-off the claims between joint tortfeasors, this isn't my language. This is the Tech-Bilt decision. And, Your Honor, I really encourage you to take a look at it and specifically it's 380 Cal.3d 488 and look at 499. This is the 1985 case. It defines what good faith is in California as it relates to 877.6. And it specifically goes to whether the amount of the settlement is within the reasonable range between the settlement tortfeasors' proportionate share of comparative liability for the plaintiff's interest.

What is -- and there's other cases as well, and I think we cited in our papers, it's about did they get a great deal because they under paid thereby requiring us to over pay. And then the question is, is it out of the ballpark? Not my language. That's Tech-Bilt's language.

All of those facts have to be evaluated on a record. And when, you know, respectfully, to the advocacy, but when Mr. Steinberg gets up here and argues facts, and suggests, for example that we had ninety percent of the position that we took out all of our equity, that we didn't

put money back in, those are demonstrably not true.

And while you may not know that, Judge Smith does because Judge Smith saw that record. They know that we actually didn't make money on the deal. We lost money. LBREP Lakeside put $38 million back in after taking out the dividend. And that we didn't earn a profit. And that when we put forward our record getting the good faith finding in front of her, it wasn't just a stale record. It was affidavits. It was affidavit-based after discovery, including affidavits from me and the mediator in the case. And it was done on a record after they settled up, which is fine, which is what the process should be.

So our position is, you know, 9019 does not automatically equal an 877.6 finding. It's an (indiscernible -- 02:11:44) question whether if everybody got a 9019, is it possible? We believe it is because they can under pay and we can over pay. And our point on this is, you know, there's a conflation of facts and a conflation of standards.

The California law on this isn't just Tech-Bilt. But there are other cases as well. And, in particular, you know, another case to look at is the Mattco Forge case that we cited. And in that case an appellate court in California reversed the trial court's decision granting a 90 -- sorry, an 80 -- a good faith finding, under 87.6 because there

wasn't evidence of disproportionate liability. There wasn't an evaluation between the two, the settling parties and the non-settling parties. And without that, the appellate court said, you don't have a sufficient record to enter that finding. And so that's the Mattco Forge case, that's 3 -- 38 Cal.App.4th 1337. That's a Second District decision out of California from '95.

And I also -- and encourage the Court to look at the Horton versus Superior Court case, 194 Cal.App.3rd 727, that's a Fifth District decision our of '87 where again in making the determination the Court said the judge is not required to determine whether the settlement is reasonable between the settling parties but rather he's required to determine whether the settlement is reasonable viz a viz the non-settling parties.

And that's my point here. Under 877.5, if you're going to cut-off contribution and equitable indemnification claims under California law, you've got to be able to evaluate both of those settlements. And our settlement, yes, we paid $13.8 million. Right, we used cash and insurance proceeds to do so. Nothing wrong with using insurance proceeds, we paid those premiums. That's part of what we gave up.

THE COURT: How much of that was insured?

MR. MCKANE: It was approximately forty-five

percent. That was a deal that was negotiated with the insureds.

MR. STEINBERG: I didn't hear that. Say it again.

MR. MCKANE: Forty-five percent.

MR. STEINBERG: Forty-five percent insurance.

MR. MCKANE: Right. Their payment -- and, Your Honor, if -- I can be more precise. I don't know that number immediately on the top of my head. But their settlement, you know, when Mr. Steinberg wants to for advocacy purposes, he takes on the entire first lien group. He's not the first lien group entirely. He's thirty percent of that is the position of LCPI. At most what they put in is 3.8 million. That's what we broke down in our opposition brief.

So it's not eleven to twelve million. It's not -- it's not exactly the same. And we're not in a situation where it's apples to oranges. We're both joint tortfeasors. That was the allegation. They like to introduce the concept of apples to oranges because they also lost in the loan. But what they were settling out, that we are saying was inequitable was the liability arising out of the way they structured the loan. And that's what we took issue with. That's the $50 million issue was it really a $75 million loan or was there a restriction put on at the last minute.

Remember, I'm not the borrower. I'm one of the

equity owners of the borrower.

THE COURT: So --

MR. MCKANE: So you're saying, so what.

THE COURT: So I just have a better understanding as to the economics here --

MR. MCKANE: Yes.

THE COURT: -- why the parties are energized about this fight. This is not a lot of money in the context of Lehman Brothers.

MR. MCKANE: No, it's not, Your Honor.

THE COURT: It's not even a lot of money in the context of SunCal. So it's hard for me to judge the motivation for this at this point and what the problem is in simply walking away from this now. This is, with respect to everybody involved, very old news. And, to the extent that we're dealing with what amounts to a 12(b) (6) standard on claim disallowance, based on the argument that as a matter of law, you can't bring a claim for contribution and indemnity because of these settlements, you're resisting that.

MR. MCKANE: Absolutely.

THE COURT: Let's just say, for the sake of discussion, that I agreed with you. What would you be looking for next?

MR. MCKANE: Your Honor, frankly, I think that's

the ultimate getting item. We have -- I'm not going to go into the substance of settlement discussions. I will only point to what they said to you their papers which was I was told to take my toys and go home. Right?

I actually think getting past that issue may enable us to resolve this issue and never see you again as it relates to this dispute. We'd obviously like to see you in other settings. But -- with -- but that's it.

THE COURT: Both you and Mr. Steinberg seem to agree on that.

MR. MCKANE: Yeah, we do.

THE COURT: That's very sweet. I appreciate it.

MR. MCKANE: We enjoy this. I can't believe it's taken this much time and I apologize.

But I think if we were to get past that, my point is only this. I -- thank you for accepting hopefully the point on it's a matter of law.

You also cannot accept just those two points. Right? What they paid versus what we were paid. We've never been able to take discovery of them as it relates to this last minute restriction. I have emails from our files from Lehman loan personnel that indicate that it was put on at the last minute. That would be the focus of any discovery. But --

THE COURT: But --

MR. MCKANE: -- frankly, I think --

THE COURT: -- let's --

MR. MCKANE: -- more important --

THE COURT: -- break in for a second and say -- because I have a -- my reaction to that is, is so what?

MR. MCKANE: Right. I actually think --

THE COURT: Because the underlying facts of the claims brought by the SunCal trustee against each of you are what they are.

MR. MCKANE: Right.

THE COURT: They've been settled out. And they've been settled out for relatively modest sums. So we all know from experience that that which makes for a good settlement isn't necessarily what makes for a good litigation victory. Settlements take into account all manner of puts and calls.

MR. MCKANE: Uh-huh.

THE COURT: So you get to a certain practical judgment. We'd rather pay the money than spend however much more we need to spend in litigation expense, risk and uncertainly. Life's too short. Let's move on.

That's my point right now, too.

MR. MCKANE: Agreed.

THE COURT: Why are you fighting over this?

MR. MCKANE: Right.

THE COURT: Why is this still a matter that

requires your time and the time of your associates?

MR. MCKANE: Yeah.

THE COURT: Why are we in court today fighting over this legal principle? What's the real economics?

MR. MCKANE: Right. The real economics are not large, as you sense, and there has been an inability between my client, which is a former affiliate of his client, to be able to come to rest on a number, I think because of this -- either because of a fundamental legal disconnect, which is possible, or stubbornness, which is also possible.

But I would like to think that getting a ruling on this one way or another will bring the parties closer together to resolve this matter. That's the goal.

THE COURT: Well, let me say that as a -- just as a matter of principle within the context of this massive bankruptcy, I don't believe that parties ever contemplated that when they obtained orders of separate bankruptcy courts approving their separate settlements that there were reserved rights of indemnity and contribution.

And certainly I never assumed and I doubt that Judge Smith ever assumed that there would be further finger pointing and claims made as between the settling parties after the settlements were approved. We are now years later in the context of a settled process that has been in place in this Court for years relating to claims allowance,

expungement, reconciliation and the like.

MR. MCKANE: Uh-huh.

THE COURT: I'm not sending this to California.

MR. MCKANE: Understood.

THE COURT: I am capable, as is Judge Smith, of applying settled law to a bankruptcy context and I know more about the claims process at this juncture than any other bankruptcy judge in any district in this country.

So as to your request that this be transferred to Santa Ana, California, that request is denied.

As to the question of whether I can as a matter of law decide now whether parallel 9019 approvals constitute compliance with the good faith standards of 877.6, I suspect I can go either way.

MR. MCKANE: Uh-huh.

THE COURT: I believe that to argue 877.6 at this point is to go over the line of advocacy. In the ordinary course of bankruptcy administration, 9019 settlements are designed to be final. And unless that are expressly reserved rights, that's the end of the matter.

The technical question which you are raising is one that I believe I could decide in Mr. Steinberg's favor and that that would not be an abuse of discretion and it would not be reversed.

I also believe that it would be foolish for your

clients to spend another nickel on legal expenses to deal with this theoretical question.

But I am also troubled that you are raising an issue that bankruptcy judges in approving 9019 settlements don't generally take into consideration and the Lehman Brothers, SunCal duality is something that I have lived with for about four and a half years.

These are highly unusual cases in that there have been dueling jurisdictional demands made on both Courts throughout the administration of these cases. This is simply the latest and I presume last gasp of that.

While I am very clear in determining that this Court is the one Court to deal with claims against the Lehman estate, I am less clear as to whether the record is sufficient to make a confident determination as to proportionate liability to the extent that proportionate liability is even a material question to ask about.

(Pause)

THE COURT: So what I'm going to do is to give the parties an opportunity to make some further submissions on this point. I don't want to burden you with the need to further appear.

I would like Mr. Steinberg, in a very succinct fashion, and it can be by means of a letter brief, to point me, bullet point by bullet point, to all of the factors that

would support my determination that the settlement is in good faith and, as a result, there are no contribution and indemnity claims as a matter of law.

And I would like Mr. McKane to do the same for his client to prove, if he can, the opposite.

I'll take the question under advisement and will issue an order within a matter of weeks after your submission of these letter briefs and I suggest that they be submitted simultaneously without further reply within fifteen days.

(Pause)

THE COURT: In the process of your doing this modest incremental work, I think it would be desirable for the parties to spend a moment or two together thinking about whether it is worth spending even one more hour of attorney time to deal with this issue.

I candidly find it shocking that this much effort and talent have gone into a matter of virtually no economic significance to either side. And it's as to that that I am most troubled. I understand that sometimes dispute resolution seems illusive or parties take hardnosed positions and continue to fight the good fight. But I am unable to see any material, economic issue involved in this regardless of the outcome.

(Pause)

THE COURT: So somebody should blink and if you don't, I'll blink for you.

MR. STEINBERG: Your Honor, may I just ask one question? I understand what you said but in Mr. McKane's brief -- this will just help tailor what I'm going to put in the letter brief if we get to that stage, and I would ask that because I actually have a vacation for next week, if we can have 21 days instead of 15 days to do that.

THE COURT: That's fine with me.

MR. STEINBERG: Okay. The one thing that he said, and I don't really mean to try to pin him down, but I write a different brief if this is what he said. He said that the joint tortfeasor aspect of what happened here is that he was sued for breach of fiduciary duty and that we were sued for breach of fiduciary duty and that's the overlap that creates the issue.

If that's the case, then I write one type of brief which is a little different than what I've written before because, frankly, I'm not even sure if I was sued -- if my client was sued for breach of fiduciary duty, but if they did, I'm pretty sure that that one was a throw away type argument. But if that's what he thinks that he over paid to the extent that my client under paid for that, then I'm writing a brief that's directed to that issue only. And if that's what it is, then I ask Mr. McKane to just clarify

that's what he was talking about.

MR. MCKANE: Well, I'll start with the fact that I'd heard seven things that he stipulated to at the beginning, one of them was they were joint tortfeasors and we were operating under that.

When he backtracked on that, I tried to highlight one aspect in which we were joint tortfeasors and that was the draft complaint that was attached to the opposition to the motion for him to foreclose on the loans, in which count six said, under breach of fiduciary duty that we were one of the defendants and he was going to be one of the defendants. That was one aspect of it.

But it was in response to his, I perceived, retreating from his initial position that he agreed that for the purposes of this motion, we were joint tortfeasors that I brought that up. It was a rebuttal point.

MR. STEINBERG: I take it, again, because I said I didn't want to pin him down, is that he doesn't think that -- because we're doing simultaneous briefing, that he doesn't think that that if I -- that his brief is going to be limited to the joint tortfeasor aspect of a breach of fiduciary duty and he's looking at this in a larger way. And if that's what -- if that's what you just said, then I understand what I have to brief.

THE COURT: Okay. I'm just looking for a --

MR. MCKANE: Yeah.

THE COURT: -- succinct statement as to why each of you win. Don't repeat your existing briefing but you can point me to sections of your briefs or to cases that you think I should pay particular attention to.

With no offense, this is an interesting but seemingly unimportant dispute.

MR. STEINBERG: And I take it that if I said to Mr. McKane that we should both limit ourselves to ten pages that would be okay?

THE COURT: Oh, I'd like you --

MR. MCKANE: Absolutely.

THE COURT: -- to limit yourselves to five pages.

MR. STEINBERG: And the five pages, I just wanted to be able to -- I didn't -- I thought Your Honor was looking for something short and so five pages is fine with us.

THE COURT: Do I here four pages?

(Laughter)

THE COURT: Five pages it'll be.

MR. STEINBERG: Thank you.

THE COURT: Okay.

MR. MCKANE: Thanks, Your Honor.

THE COURT: We're adjourned.

(Whereupon these proceedings were concluded at 12:36 PM)

I N D E X

R U L I N G

C E R T I F I C A T I O N

I, Nicole Yawn, certify that the foregoing transcript is a true and accurate record of the proceedings.

Nicole Yawn

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I, Pamela A. Skaw, certify that the foregoing transcript is a true and accurate record of the proceedings.

Pamela A Skaw

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I, Jamie Gallagher, certify that the foregoing transcript is a true and accurate record of the proceedings.

Jamie Gallagher

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